

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DUYET HUNG LE,	)	
	)	
Plaintiff,	)	
	)	Civil No. 07-39-ST
v.	)	
	)	ORDER
UNITED STATES OF AMERICA and	)	
CPL S. LACY,	)	
	)	
Defendants.	)	
_____	)	

Duyet Hung Le  
ID# 7139133  
Oregon State Correctional Institution  
3405 Deer Park Drive SE  
Salem, Oregon 97310

Pro Se Plaintiff

Karin J. Immergut  
United States Attorney  
District of Oregon

-and-

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Attorneys for Defendants

KING, Judge:

The Honorable Janice M. Stewart, United States Magistrate Judge, filed Findings and Recommendation on April 19, 2007. Plaintiff filed timely objections to the Findings and Recommendation. When either party objects to any portion of a magistrate's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate's report. 28 U.S.C. § 636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982). The matter is before this court pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

This court has, therefore, given de novo review of the rulings of Magistrate Judge Stewart. I decline to adopt Magistrate Judge Stewart's findings concerning the application of 28 U.S.C. § 2678(d)(2) and the timeliness of plaintiff's Motion to Remand.

The federal district courts have exclusive jurisdiction of civil actions on claims against the United States for money damages resulting from torts committed by a federal employee or federal agency or the United States itself, if the employee was acting within the scope of his office or employment. 28 U.S.C. § 1346(b)(1). Under the Federal Tort Claims Act, the United States has the right to remove the action to a federal district court "at any time before trial." 28 U.S.C. § 2679(d)(2). Since plaintiff here did not name an individual employee, there was no need, or indeed any ability, for the Attorney General to certify that the employee was acting within the scope of employment. Although the statute is not worded clearly, I agree with the

United States that it cannot follow that a tort claim improperly naming a federal employee can be removed at any time but a tort claim naming a federal agency or the United States must be removed within 30 days. Accordingly, I conclude that the United States was not late in removing the action. This also means that there is no need to address the timeliness of plaintiff's Motion to Remand, which appears to be timely under the mailbox rule, now that we have additional information about when he turned the motion over to the prison authorities for mailing.

I adopt the remaining portions of the Findings and Recommendation of Magistrate Judge Stewart dated April 19, 2007.

IT IS HEREBY ORDERED that plaintiff's Motion to Remand (#15) is denied. The United States' Motion to Dismiss (#5) is granted. The claims against the United States are dismissed with prejudice.

DATED this 22<sup>nd</sup> day of May, 2007.

/s/ Garr M. King

GARR M. KING  
United States District Judge